

1999

Dorann Mitchell v. Jesse Christensen and Betty Christensen: Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

* * * *

DORANN MITCHELL,

Plaintiff/Appellant,

vs.

JESSE CHRISTENSEN and BETTY
CHRISTENSEN,

Defendants/Appellees.

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APPELLANT'S OPENING BRIEF

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Case No. 990321-CA

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Priority 15

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PLAINTIFF'S APPEAL FROM A FINAL ORDER OF THE THIRD JUDICIAL
DISTRICT COURT, THE HONORABLE DENNIS M. FUCHS PRESIDING

* * * *

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FILED

Utah Court of Appeals

OCT 14 1999

Julia D'Alesandro
Clerk of the Court

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DORANN MITCHELL,

Plaintiff/Appellant,

vs.

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over this appeal by virtue of Utah Code Ann. section 78-2a-3(2)(j).

STATEMENT OF ISSUES AND STANDARDS OF REVIEW

Whether the trial court erred in granting summary judgment in favor of defendants. Summary judgment presents only questions of law reviewable for correctness. *Mills v. Brody*, 929 P.2d 360 (Utah App. 1996). This issue was preserved in plaintiff's Response to defendants' Motion for Summary Judgment. (R. 114-132)

DETERMINATIVE CONSTITUTIONAL PROVISIONS, ETC.

There are no determinative constitutional provisions, statutes, ordinances, rules, or regulations whose interpretation is determinative or of central importance to this appeal.

STATEMENT OF THE CASE

I. Nature of the Case

This is an appeal from a final order of the Third Judicial District Court of Salt Lake County granting defendants' Motion for Summary Judgment.

II. Statement of Facts

1. On or about September 25, 1995, plaintiff purchased a home from defendants located at 2820 East Robidoux Road, Sandy, Utah, which included a backyard swimming pool. (R. 51)

2. At the time of sale, there were a number of leaks in both the piping and the body of the swimming pool. (R. 129-130, 135)

3. Plaintiff had no knowledge of the leaks when she purchased the property. (R. 131)

4. Plaintiff would not have purchased the property or would not have paid the price she paid for the property had she been aware of the leaks. (R. 33)

5. Defendants were aware of the leaks, yet failed to disclose their existence to plaintiff. (R. 135)

6. The Real Estate Purchase Contract entered into by the parties authorized plaintiff to inspect the property. (R. 52)

7. Plaintiff inspected the property herself and hired a professional inspector, AmeriSpec-Salt Lake, to inspect the property. (R. 52-53)

8. AmeriSpec found the pool area and equipment covered by the inspection to be in working order. However, the inspection report was qualified:

Our review is limited to above ground or visible items only. It is an operational inspection of the accessible equipment and components and is therefore limited in scope. If concerned, client is advised to have a licensed pool company perform an in-depth review and/or service.

(R. 107)

9. Plaintiff had no reason to be concerned and did not arrange for an in-depth review of the swimming pool. (R. 131)

10. An in-depth review of the pool would have revealed the leaks. (R. 108-109)

11. Plaintiff and her husband inspected the pool on a number of occasions prior to closing the purchase transaction. During each of those inspections, the pool was full of water and

there was no visible indication that the pool leaked. (R. 127, 131)

12. Plaintiff commenced this action against defendants on July 30, 1997. In her Second Amended Complaint, plaintiff seeks compensatory and punitive damages based upon defendants' fraudulent nondisclosure/concealment of the existence of the swimming pool leaks. (R. 32-34)

13. Defendants filed their Motion for Summary Judgment on July 22, 1998. (R. 110-112) Plaintiff filed her Response to defendants' Motion for Summary Judgment on August 4, 1998 (R. 114-132), and defendants filed a reply memorandum on September 4, 1998. (R. 135-137)

14. For purposes of this appeal, defendants' Motion for Summary Judgment was based upon their contention that, even if they were aware of the leaks, they had no duty to disclose them to plaintiff because plaintiff could have discovered them for herself through the exercise reasonable care. According to defendants, even though plaintiff and her husband both inspected the pool and took the additional step of hiring a professional inspector to inspect the property, including the pool, plaintiff's failure to have a licensed pool company perform an in-depth review of the pool was unreasonable. (R. 56-57)

15. On March 18, 1999, the trial court granted defendants' Motion for Summary Judgment, ruling as follows:

Having reviewed all affidavits and memoranda that pertain to the Motion, and Plaintiff having waived oral argument, this Court has concluded that there are no genuine issues of material fact and that Defendants are entitled to judgment

as a matter of law. Specifically, this Court finds that Plaintiff had a duty and opportunity to conduct a thorough inspection of the pool and failed to do so. Under these circumstances, even if Defendants knew of the defects, based on caveat emptor, Defendants did not have a legal duty to disclose.

(R. 150)

SUMMARY OF ARGUMENTS

In a vendor-vendee transaction, the vendor has a duty to disclose known defects which are not discoverable by reasonable care. *Maack v. Resource Design & Const., Inc.*, 875 P.2d 570, 579 (Utah App. 1994) (citing *First Security Bank v. Banberry Development*, 786 P.2d 1326, 1331 (Utah 1990)). In the case at bar, plaintiff exercised reasonable care by inspecting the pool herself and by hiring a professional inspection company to inspect the property, including the pool. Plaintiff's duty of reasonable care did not require her to take the extra step of hiring a licensed pool company to perform an in-depth review of the pool, even though in hindsight such a review would have revealed the existence of the leaks. Accordingly, defendants owed plaintiff a duty to disclose the existence of the leaks.

Additionally, the trial court imposed upon plaintiff a duty to "conduct a thorough inspection of the pool." This heightened duty is irreconcilable with the duty of "reasonable care" recognized in *Banberry* and *Maack*. Accordingly, the trial court's Order Granting Motion for Summary Judgment is contrary to law and should be reversed.

ARGUMENTS

The trial court erred in granting defendants' Motion for Summary Judgment.

Summary judgment presents only questions of law reviewable for correctness. *Mills v. Brody*, 929 P.2d 360 (Utah App. 1996). When reviewing a motion for summary judgment, the facts, the evidence, and every reasonable inference arising therefrom, must be considered in a light most favorable to the non-moving party. *Maack v. Resource Design & Const., Inc.*, 875 P.2d 570, 574 (Utah App. 1994).

A. Plaintiff exercised "reasonable care" in her inspection of the property.

In a vendor-vendee transaction, such as the one at issue in the present case, a duty to disclose known defects exists where the defects are not discoverable by the exercise of reasonable care. *Maack*, 875 P.2d at 579. In the case at bar, for purposes of their Motion for Summary Judgment, it is undisputed that defendants knew their swimming pool had a pervasive problem with leaks when they sold it to plaintiff. Accordingly, unless plaintiff failed to exercise of reasonable care in her inspection of the property, defendants owed plaintiff a duty to disclose the existence of the leaks.

Plaintiff respectfully submits that she exercised reasonable care in her inspection of the property. Plaintiff and her husband inspected the pool on a number of occasions prior to purchasing the property. On each occasion, the pool was full of water and there was no visible indication that the pool leaked.

Nevertheless, plaintiff hired a professional inspection company, AmeriSpec-Salt Lake, to inspect the property. AmeriSpec found the pool area and equipment covered by the inspection to be in working order. However, the inspection report stated that:

Our review is limited to above ground or visible items only. It is an operational inspection of the accessible equipment and components and is therefore limited in scope. **If concerned**, client is advised to have a licensed pool company perform an in-depth review and/or service.

(R. 107) (emphasis added). Plaintiff had no reason to be concerned and did not arrange for an in-depth review of the swimming pool. Plaintiff respectfully submits that it was reasonable for her not to do so.

If AmeriSpec's report had unequivocally advised plaintiff to have an in-depth review of the pool by a licensed pool company, it may have been unreasonable for plaintiff to have failed to obtain such a review. That is not the case. To the contrary, the report advised plaintiff to have such a review only if she was "concerned." Plaintiff, however, had no reason to be concerned. The leaks were not visible and in fact were not discovered by the professional inspector hired by plaintiff. Defendants, on the other hand, were well aware of the leaks and could easily have disclosed their existence.¹

¹Given the fact that the pool was always full of water on the several occasions on which plaintiff and her husband inspected the pool prior to closing and that it was leaking like a sieve immediately thereafter, it is reasonable to infer that defendants actively concealed the leaks by keeping the pool full of water so that the leaks would not become apparent until after defendants were long gone to their new residence in Arizona.

Defendants rely on this Court's decision in *Maack v. Resource Design & Const., Inc.*, 875 P.2d 570 (Utah App. 1994). There, the plaintiff/home buyers sued the defendant/home seller alleging that the defendant failed to disclose the known defective condition of the home's stucco prior to the time of sale. This Court affirmed the trial court's grant of summary judgment in favor of the defendant in large part due to the fact that it was undisputed that, for aesthetic reasons, the defendant had intentionally chosen a cement-based stucco instead of synthetic acrylic stucco, even though the cement-based stucco had a potential for cracking and might not be appropriate in freezing climates. It was also undisputed that the plaintiffs "did not have the home inspected before they agreed to purchase it ...". 875 P.2d at 573. After the stucco subsequently began cracking, the plaintiffs filed suit alleging causes of action for fraudulent concealment and fraudulent nondisclosure.

With respect to the fraudulent concealment claim, the *Maack* court held that

[t]he facts alleged by the Maacks fail to support a claim for fraudulent concealment, as no evidence is offered to prove that [the seller] intentionally or actively concealed any defect in the home.~ Indeed, [the seller] preferred for aesthetic reasons the substituted stucco, even though it had a greater chance of cracking.

875 P.2d at 578.

Thus, even though the stucco at issue in *Maack* could technically have been considered defective because it later

²Citations omitted.

turned out that it had a cracking problem, there was no evidence that the seller considered it to be defective at the time of sale because he specifically chose it for aesthetic reasons in spite of the fact that it had the potential for cracking. In the case at bar, however, defendants obviously did not intentionally choose a swimming pool with leaks. And they certainly cannot claim that they did not consider the leaks to be defects because they were aesthetically pleasing.

With respect to the Maack's fraudulent nondisclosure claim, the court held as follows:

Although this issue presents a close call, we hold that under these circumstances [the seller] had no legal duty to disclose his doubts, if any, about the integrity of the stucco.

875 P.2d at 579.

Thus, the buyers' failure to obtain an inspection of the property, coupled with the fact that the seller did not consider the stucco to be defective in the first place, but, rather, aesthetically pleasing, presented a "close call" for this Court in *Maack*. The case at bar does not present a close call. In contrast to the Maacks, plaintiff did have the property inspected prior to closing. More importantly, defendants cannot say that even though they were aware of the leaks they did not consider them to be defects, as was the case in *Maack*. To the contrary, the pool was obviously defective and its condition should have been disclosed.

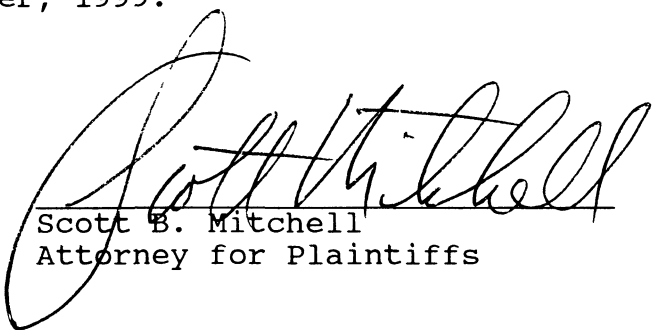
B. The trial court' imposition of a heightened duty of care was erroneous.

In granting defendants' Motion for Summary Judgment, the trial court ruled that "Plaintiff had a duty ... to conduct a thorough inspection of the pool and failed to do so." Plaintiff respectfully submits that the trial court's imposition of a heightened duty to "conduct a thorough inspection" is in conflict with the duty of "reasonable care" set forth in *Banberry*, 786 P.2d at 1331, and *Maack*, 875 P.2d at 579. For this additional reason, the trial court's Order Granting Motion for Summary Judgment is contrary to law and should be reversed.

CONCLUSION

Based on the foregoing, plaintiff respectfully requests that the trial court's Order Granting Motion for Summary Judgment be reversed and that this case be remanded to the trial court for a trial on the merits.

DATED this 14th day of October, 1999.


Scott B. Mitchell
Attorney for Plaintiffs

MAILING CERTIFICATE

Undersigned certifies that two copies of the foregoing were mailed this 14th day of October, 1999, via first class U.S. Mail, postage prepaid, to the following:

George E. Harris, Jr.
Gateway Tower East, Suite 900
Salt Lake City, Utah 84133



Addenda

FILED DISTRICT COURT
Third Judicial District

MAR 10 1998

SALT LAKE COUNTY

Deputy Clerk

CALLISTER NEBEKER & McCULLOUGH
George E. Harris, Jr. (4781)
Gateway Tower East, Suite 900
Salt Lake City, Utah 84133
Telephone: (801) 530-7300

Attorneys for Defendants

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH, DIVISION II

* * * * *

DORANN MITCHELL,)	ORDER GRANTING MOTION
)	FOR SUMMARY JUDGMENT
Plaintiff,)	
)	Civil No. <u>970006149</u>
vs.)	
)	Judge Dennis M. Fuchs
JESSE CHRISTENSEN and BETTY)	
CHRISTENSEN,)	
)	
Defendants.)	

* * * * *

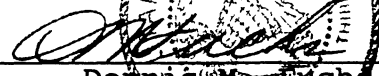
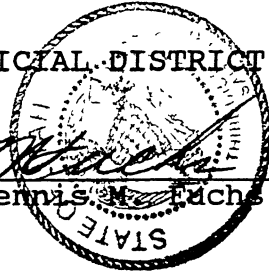
Before this Court is Defendants' Motion for Summary Judgment (the "Motion"), filed July 22, 1998. Having reviewed all affidavits and memoranda that pertain to the Motion, and Plaintiff having waived oral argument, this Court has concluded that there are no genuine issues of material fact and Defendants are entitled to judgment as a matter of law. Specifically, this Court finds that Plaintiff had a duty and opportunity to conduct a thorough inspection of the pool and failed to do so. Under these circumstances, even if Defendants knew of the defects, based on caveat emptor, Defendants did not have a legal duty to disclose.

Accordingly, pursuant to Rule 56 of the Utah Rules of Civil Procedure, IT IS HEREBY ORDERED that Defendants' Motion for Summary Judgment is GRANTED.

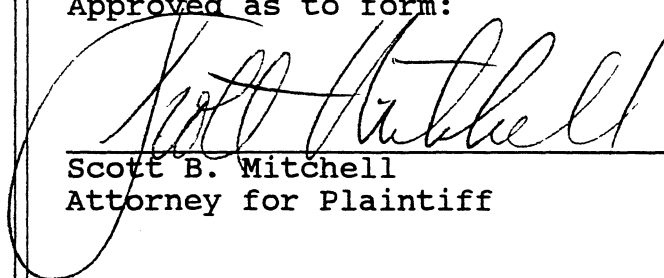
DATED this 18 day of March, 1999.

THIRD JUDICIAL DISTRICT COURT:

By


Dennis M. Luchs


Approved as to form:


Scott B. Mitchell
Attorney for Plaintiff